

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-6021

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To be argued by
WALLACE MUSOFF

In The
United States Court of Appeals
For The Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

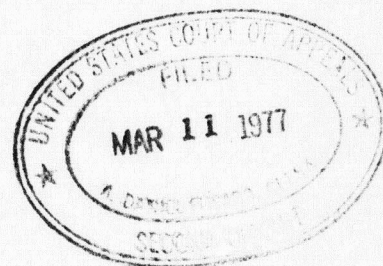
vs.

SALVATORE CIRAMI, ET AL.,
Defendants,

SALVATORE CIRAMI & MARGARET CIRAMI,
Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS

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Statutes Involved

Title 28 United States Code, Rule 60.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons, (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. Sec. 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-6021

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

vs.

SALVATORE CIRAMI, et al.

Defendants,

SALVATORE CIRAMI & MARGARET CIRAMI

Defendants - Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

QUESTIONS PRESENTED

1. Whether the Court below erred in refusing to consider evidence newly discovered subsequent to this Court's affirmance of the District Court's prior order dismissing appellants' motion to vacate summary judgment under Rule 60 (b) (6) of the Federal Rules of Civil Procedure?

2. Whether this Court should reconsider its prior opinion in light of this evidence newly discovered?

PRELIMINARY STATEMENT

Salvatore and Margaret Cirami ("Cirami") appeal from an Order entered on January 10, 1977, by the United States District Court for the Eastern District of New York (Hon. Thomas C. Platt, Jr, J.), denying reconsideration of appellants' renewed motion to vacate summary judgment previously entered against them on June 12, 1974, in the amount of \$270,792.43, plus statutory interest, based upon evidence discovered subsequent to this Court's affirmance, in United States v. Salvatore Cirami, 535 F.2d 736 (2d. Cir. 1976), of the original order of the United States District Court for the Eastern District of New York (Bruchhausen, J.), entered on October 6, 1975, denying appellants' prior motion to vacate judgment, pursuant to Rule 60 (b) (6) of the Federal Rules of Civil Procedure. The opinion and order of Judge Platt have not been reported and are reproduced at A.156 of Appellant's Appendix.

STATEMENT OF FACTS

Prior Proceedings

This appeal represents the second time appellants come before this Court. The original appeal, decided adversely to the Ciramis, arose from an adverse holding by Judge Bruchhausen of the Eastern District of New York, entered on October 6, 1975, denying the Ciramis' motion to vacate summary judgment, pursuant to Rule 60(b) (6) of the Federal Rules of Civil Procedure. The Ciramis' motion was predicated upon a factual showing that they did not owe the judgment summarily entered against them in the tax proceeding

instituted against them in District Court and that the Government's motion for summary judgment was improper in that triable issues of fact existed. In support thereof, the Ciramis had submitted books, records and accountants' analyses to establish their position, which documentation the Government never refuted. Furthermore, the Ciramis attempted to demonstrate that, as a matter of law, they were entitled to challenge the tax liabilities asserted against them, and that, thus, triable issues of fact existed at the time summary judgement was initially granted.

In affirming Judge Bruchhausen's original order, this Court ruled that, notwithstanding the Ciramis meritorious substantive defense to the asserted deficiencies, such a defense is not determinative to the granting of a Rule 60(b)(6) motion.

(A.168). What is determinative is the finding of "exceptional circumstances" (Riniere v. News Syndicate Co., 385 F.2d 818 (2d. Cir. 1967)) or "extreme hardship" (United States v. Karahalias, 205 F.2d 331, 333 (2d. Cir. 1953)). 535 F.2d at 168. This Court found both elements wanting and, consequently, affirmed the order of the Court below. The threshold question of whether, because triable issues of fact existed, the motion for summary judgment was proper in the first instance was not commented upon.

In so ruling, this Court took pains to note that the pleadings were devoid of reasons why prior counsel, Peter Newman, Esq., failed to oppose the Government's summary judgment motion, or what contact, if any, was made with prior counsel relative to

ascertaining the reasons for his default. (A. 163). It was brought out in oral argument, and incorporated in the opinion, that the reason for the default was unknown and that Newman was not speaking to his former clients. (A. 163).

In fact, such was the case at the time the original motion was brought and until the opinion of this Court was rendered. Both the affidavit of Mr. Cirami (A. 189 - A. 190) and Wallace Musoff, Esq. (A. 191 - A. 194), submitted in support of the renewed motion, state that there was no contact with Mr. Newman concerning his illogical default since telephonic attempts to reach Mr. Newman were completely unavailing. It was for that reason that counsel, in oral argument, stated that the basis for default by Newman was "unknown". Moreover, counsel was unable to avail himself of the processes of the Court since the original motion was denied without a requested evidentiary hearing having been granted.

In this regard, it should be noted that, subsequent to the initial appeal, it was learned that the Government's own files contained an internal memorandum (A. 188), in existence long prior to the Ciramis' original motion, which reflected fruitless attempts by the Court (Judge Bruchhausen) to contact Mr. Newman without securing a satisfactory response. (A. 188).

The inability of Judge Bruchhausen to contact Mr. Newman (see Court's memorandum reflecting that Mr. Pellegrino spoke only to his secretary) bears out the inability of instant counsel and

the defendant to contact Mr. Newman. (A. 191). See also the affidavit of Louis DeStefano. (A. 197).

It should be further noted that during oral argument whereby instant counsel explained his inability to make contact with Newman to this Court, the Government not only failed to make known that even Judge Bruchhausen had not been able to make such contact, but affirmatively sought to cast doubt upon counsel's efforts in this regard.

Newly Discovered Evidence

Subsequent to this Court's prior decision, on May 10, 1976, Mr. Newman finally responded to repeated inquiries by instant counsel. (A. 192). Mr. Newman was informed of the opinion of this Court, being told that it made reference to him by name. He thereupon consented to meet with counsel and requested that a copy of the opinion be produced.

On May 27, 1976, Mr. Newman, for the first time, met with the undersigned, Ciramis' present attorneys. When asked why he did not oppose the Government's summary judgment motion and why he did not respond to telephone calls from his client or other attorneys, Mr. Newman stated that he was most reluctant to state the reasons for his default.

However, after having been advised of the fact that if this judgment were to stand against the Ciramis they would suffer total financial ruin, Mr. Newman finally stated that he had defaulted because of alleged assurances given by Department of Justice representatives during a conference in Washington, D.C. These assurances

were in the nature of an understanding that, even if the Government were to take total judgment against the Ciramis, only the actual amount of tax due would be sought.

Because of the inherent incredulity of Newman's statement, he was pressed as to names and dates of the participants in the conference. Mr. Newman stated he would search his records and a subsequent conference was scheduled to cull out this information. Mr. Newman was provided a copy of the opinion and informed that he would be expected to place his statements under oath. He was then asked if there was anything embarrassing in his background and he stated that he was the subject of disciplinary charges by the Bar Association, but refused to elaborate on the nature of the charges.

Mr. Newman thereafter met with Ciramis' present counsel on June 8, 1976, and disclosed, for the first time, that the actual reason he failed to oppose the Government's summary judgment motion was his suffering from a mental disorder during the time the motion for summary judgment was made, which disorder manifested itself, inter alia, in his failure to complete work promised to his clients. Further, he revealed that he was seeing a psychiatrist during this period in an endeavor to cure the disorder. He also stated that the disciplinary charges against him before the Bar Association involved his inability to complete required work. Finally, Mr. Newman agreed to submit an affidavit to such effect and waive his physician-patient privilege. On June 10, 1976, he submitted the affidavit attesting to his June 8, 1976 statement. (A. 203).

On July 6, 1976, Mr. Newman submitted a letter authorizing the release of certain medical information. (A. 205).

On July 12, 1976, Dr. Reiter wrote this office confirming that Mr. Newman, in fact, had been treated by his office during a two-year period. (A. 206).

Given the proximity of his treatment to the default judgment, coupled with the obvious continuing nature of Newman's illness, as disclosed by Newman's affidavit and admissions to present counsel, a cogent explanation for Peter Newman's default in the instant proceeding is readily apparent.

Armed with this arsenal of newly discovered facts, suggesting in the strongest possible terms that their substantive rights had, in fact, been innocently jeopardized by their then attorney's undisclosed mental disabilities, the Ciramis filed a renewed motion to vacate summary judgment, pursuant to Rule 60(b) (6) of the Federal Rules of Civil Procedure, seeking either vacatur of the summary judgment or, at the very least, an evidentiary hearing wherein the facts could, for the first time, unfold. The motion was denied without an evidentiary hearing by Judge Platt in an order entered on January 10, 1977.

It is from the denial of this renewed motion, based upon newly discovered evidence, that the Ciramis appeal.

POINT I

THE DISTRICT COURT ERRED IN REFUSING TO CONSIDER THE NEW EVIDENCE PRESENTED

In refusing to consider the new evidence presented by

the Ciramis in attempting to vacate judgment, the Court below relied upon a mechanical application of the "law of the case" Principle, citing United States v. Fernandez, 506 F.2d 1200 (2d. Cir. 1974). (A. 262). The District Court's interpretation of Fernandez, however, was plainly misconceived, and its failure to consider the new evidence presented was clear error.

The issue in Fernandez was whether, on remand after appeal, a district court could consider new evidence and change the "law of the case" as enunciated by this Court. In deciding that, under those circumstances, new evidence would not be considered, this Court held:

Where a case has been decided by an appellate court and remanded, the court to which it is remanded must proceed in accordance with the mandate and such law of the case as was established by the appellate court. Id., 506 F.2d at 1202. [Emphasis added].

What sets Fernandez apart is that there was a reversal with specific instructions on the manner in which to proceed on remand. In the instant case, the prior opinion of this Court simply affirmed Judge Bruchhausen, without remand, based upon the facts before it. The matter, save a petition for certiorari, was thus adjudicated, and there was no avenue through which new evidence could be presented but for a renewed motion before District Court.

Therefore, it is manifest that it was within the province of Judge Platt to consider the new evidence presented. His failure to do so was reversible error.

POINT II

THIS COURT HAS THE POWER TO RECONSIDER
ITS PRIOR DECISION AND SHOULD DO SO IN
LIGHT OF THE NEWLY DISCOVERED EVIDENCE
PRESENTED

Even assuming arguendo that Judge Platt properly ruled that he could not consider the newly discovered evidence submitted, it is clearly within the province of this Court to reassess its prior decision in light of such evidence. In United States v. Fernandez, this Court stated:

An issue decided on a prior appeal is not foreclosed with all the finality of res judicata when the case comes back to this court. Although the district court may not change our mind for us, we may do so. Id., 506 F.2d at 1203.

In Uniform Sanitation Men Association v. Commissioner of State of New York, 426 F.2d 619, 628 (2d. Cir. 1970), this Circuit concluded that the "law of the case" doctrine is not rigidly binding upon a court, but is addressed only to its good sense. See Petition of Kinsman Transit Company, 388 F.2d 821 (2d. Cir. 1968). Moreover, in Poster Exchange, Inc. v. National Screen Service Corp., 362 F.2d 571, 574 (5th Cir. 1966) the Fifth Circuit, citing this Court's earlier opinion in Higgins v. California Prune & Apricot Grower, Inc. 3 F.2d (2d. Cir. 1924), stated the "law of the case" should apply unless some good reason is shown why the prior ruling should not be followed.

It is submitted that the new evidence, why Newman failed to defend against the Motion for Summary Judgment, coupled with

the proof previously submitted, demonstrating that, on the merits, the Ciramis, in reality, have a colorable defense to their purported tax liabilities and do not owe the judgment levied, is more than ample reason why the "law of the case" should not rigidly be followed in this case, and why the interests of justice dictate reconsideration of this Court's prior affirmance of Judge Bruchhausen's original order.

First, this newly discovered evidence meets the tests of Rule 60(b)(6) of the Federal Rules of Civil Procedure in that "exceptional circumstances" exist for vacating summary judgment, or, in the alternative, for at least holding an evidentiary hearing. Prior counsel's failure to oppose the Government's summary judgment motion and failure to respond to Judge Bruchhausen's repeated inquiries was the result of a recurring mental disorder which precluded him from performing his client's work. This type of medical impairment of counsel's ability to function goes beyond the mere "grossly negligent" conduct of counsel and sets this case within the ambit of Vindigni v. Meyers, 441 F.2d 376 (2d. Cir. 1971), wherein under not dissimilar circumstances, this Court granted Rule 60(b)(6) relief.

The leading case is the Supreme Court's decision in Link v. Wabash Railroad Co., 370 U.S. 626 (1962), wherein the petitioner sought relief from a Rule 41(b) dismissal of his cause of action. Petitioner had sued respondent for injuries suffered in an accident. Six years subsequent to the commencement of suit, the court scheduled a pre-trial conference, giving the parties two

weeks written notice. Counsel notified the court that, although not engaged in litigation, he was preparing papers to be filed in another matter, and would not appear at the conference. The court, having waited two hours after the scheduled conference, proceeded to dismiss the action.

In affirming, the Supreme Court took pains to note two salient facts. First, no motion pursuant to Rule 60, F.R.C.P. had been made. Id., at 635-36. Second, the Court concluded:

...that there is nothing in the record before us to indicate that counsel's failure to attend the pre-trial conference was other than deliberate or the product of neglect.

Finally, this is not a case in which failure to comply with a court order was due to inability fostered neither by...[petitioner's] own conduct not by circumstances within its control...Id., 370 U.S. at 636.

It is within this context that the Link case must be read, and it clearly supports the Ciramis' position. Prior counsel's inability to defend against the motion was not deliberate or a product of neglect. To the contrary, Newman was suffering from a mental disorder which manifested itself by his utter inability to function and complete his work. Newman was simply not in a position to control anything, least of all the defense of the Ciramis' case.

In Ackermann v. United States, 340 U.S. 194 (1950), petitioner sought relief under Rule 60(b)(6), F.R.C.P., alleging that his failure to appeal a judgment of denaturalization was due to excusable neglect. He based his claims upon (1) petitioner's

inability to afford to duplicate the record on appeal; and (2) counsel's reliance upon an Alien Control officer's alleged statement that the appeal should be ignored since petitioner would be released at the end of a War.

The Supreme Court denied petitioner relief, stating that, by allegedly relying on a government official, who was a stranger, he took a "calculated and deliberate" risk which was made freely. Id., 340 U.S. 198. The factual context is clearly inapposite to the instant situation. Newman's actions in not opposing the Government's motion herein, were neither calculated, nor deliberate, nor freely made. There was no decision on the part of Newman not to oppose the motion for summary judgment. His mental state effectively precluded any rational decision.

In Schwarz v. United States, 384 F.2d 833 (2d. Cir. 1967), the Rule 60(b) motion was denied in the following factual setting:

An action had been commenced in January of 1962 and was dismissed for lack of prosecution in August 1963, because of counsel's "leisurely attempts to locate witnesses." The case, however, was restored to the docket. A pre-trial conference was scheduled in December, 1966, more than three years after the restoration of the case to the calendar. Defense counsel thereafter contacted petitioner's counsel's office and was informed that no one in the office was familiar with the case and no one would attend the conference. However, petitioner's counsel requested trial be set on January 20, 1967 which the Judge did. On January 19, 1967,

defense counsel was informed that petitioners were not ready for trial. On January 20, upon learning of the case history, the court dismissed the case for failure to prosecute.

This court found no abuse of discretion in dismissing this case, finding as a fact that counsel had "ignored his responsibility...to prepare for trial." Id., 384 F.2d at 836. Like United States v. Erdoss, 440 F.2d 1221 (2d. Cir. 1971); Dal International Trading Co., v. Sword Line, Inc., 286 F.2d 523 (2d. Cir. 1961); and Benton v. Vinson, Elkins, Weems & Searls, 255 F.2d 299 (2d. Cir. 1958), Schwarz, concerned mistakes and omissions of counsel by reason of ignorance of laws, rules of the court or inability to manage caseload. Each case, therefore, is distinguishable from the instant facts where counsel's inability to defend is due directly to mental disorder.

In rendering its prior decision in this matter, this Court discussed L.P. Steuart, Inc. v. Matthews, 329 F.2d 234 (D.C. Cir. 1964), and stated that this Circuit was at present not inclined to follow Steuart. It is submitted, however, that the instant facts are far more favorable here than in Steuart, and that, consequently, even if this Court still chooses not to embrace the Steuart rule, given the same facts, Rule 60(b)(6) relief may be granted the Ciramis.

In Steuart, Rule 60 (b) (6) relief was granted where counsel had failed to prosecute his clients' action, resulting in a dismissal of the complaint, because counsel "had been 'beset with

personal problems' which involved a serious illness of his wife and the recent deaths of his parents." Id., 329 F.2d at 235. There was no allegation that these personal problems resulted in a mental disorder precluding action by counsel in Steuart. The incapacity to function, as opposed to the lack of desire to function, is clearly the distinction between the instant case and Steuart.

The "mental disorder" of Newman is more analogous to the situation in Vindigni v. Meyer, 441 F.2d 376 (2d. Cir. 1971) where this Court granted Rule 60(b)(6) relief. In Vindigni, some-time after commencement of the action counsel for plaintiff was "no longer attending to his practice and had reportedly 'disappeared'." Id., 441 F.2d at 377. In the instant case, counsel, by affidavit, disclosed that he was suffering from a "mental disorder" which effectively prevented him from completing his work, thus, in effect, ceasing involuntarily to represent the Ciramis. To effectively punish the Ciramis for the involuntary inability of their counsel to represent them is to run contrary to the clear rationale of Vindigni.

In view of the fact the Ciramis have a colorable and meritorious defense to the tax liabilities assessed, and given the newly discovered reason for their counsel's default, this case clamors for a reopening of the judgment, or, at the very least an evidentiary hearing to further explore Mr. Newman's affidavit.

CONCLUSION

For all the foregoing reasons, the order appealed from should be reversed and the matter should be remanded for trial on

the merits; or, in the alternative, an evidentiary hearing for the purpose of determining appellant's Rule 60(b)(6) motion.

New York, New York

Dated: March 10, 1977

Respectfully submitted,

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(212) 753-2900

OF COUNSEL:

WALLACE MUSOFF
BARRY D. GORDON

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

- against -

SALVATORE CIRAMI, et al.,

Defendants

SALVATORE CIRAMI & MARGARET CIRAMI,
Defendants-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

ss.:

I, Victor Ortega, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1715 Lacombe Avenue; Bronx, New York

That on the 9 10th day of March, 19 77 at 225 Cadman Plaza
Brooklyn, N. Y.

deponent served the annexed *Summons*

upon

U. S. Attorney-Eastern Dist.

2 David Trager

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,

Sworn to before me, this 10th
day of March, 19 77

Victor Ortega
Victor Ortega

Robert T. Brin
ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0418950
Qualified in New York County
Commission Expires March 30, 1977

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